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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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| RICHARD POLLARD,<br>Plaintiff and Appellant,<br>v.<br>METALCLAD INSULATION CORPORATION,<br>Defendant and Respondent. | A112593<br><br>(San Francisco County Super. Ct. No. 418480) |

Plaintiff Richard Pollard (Pollard) claimed that he suffered from asbestosis caused by exposure to Unibestos, a product distributed by defendant Metalclad Insulation Corp. (Metalclad). Metalclad contended that Pollard did not have any asbestos-related injury and, if he did, it was not from exposure to Unibestos. A special jury verdict determined that Unibestos had a design defect, that there was a failure to warn, and that Metalclad was negligent. That same verdict three times answered "no" to the question whether the defect, failure, or negligence was a legal cause of injury to Pollard.

On appeal Pollard asserts that there was substantial evidence to the contrary and that the trial court committed error in two evidentiary rulings. We conclude that substantial evidence supports the special verdict and that neither evidentiary contention has merit. Accordingly, we affirm.

## I. BACKGROUND

### A. Introduction

Pollard filed his complaint for damages on March 19, 2003. It apparently contained many causes of action, and named numerous defendants, as well as Does 1-8500.[1] Several of the named defendants were served and answered; other defendants were served as Does and also answered. Beginning as early as May 2004, various defendants were dismissed, and apparently others disappeared from the case for other reasons. Whatever in fact happened, by July 2005 the case had only one defendant remaining, Metalclad, and it was against Metalclad, and it alone, that Pollard proceeded to trial in July 2005.

According to Pollard's opening brief, he sought to recover damages for "asbestosis, asbestos-related pleural disease, and fear of cancer caused by his exposure to, among other things, Metalclad-supplied Unibestos insulation." Pollard's primary claim was that he had asbestosis, described as an interstitial fibrosis resulting from the scarring of the lungs, caused by the inhalation of asbestos fibers. The physical symptoms of asbestosis include restriction in the lungs (decrease in the lungs's ability to expand and contract), shortness of breath, rales, and clubbing.[2]

### B. The Parties

Pollard was born in Vallejo in 1945, and was age 59 at the time of trial. Pollard graduated from high school in 1964, following which he worked briefly at two gas stations and a car dealership. In 1966, at the age of 21, he began work at the Mare Island Naval Shipyard (MINSY), and except for a few brief periods when he worked elsewhere, he worked at MINSY for almost 30 years, until he left in 1995.

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[1] The record contains no clerk's transcript. There is a two-volume appellant's appendix which contains six trial exhibits and certain pleadings and filings below. The complaint is not included.

[2] According to Pollard's pulmonary disease expert, rales is "a physical finding that sounds like crackles," and clubbing is a "hypertrophy of the nail beds."

Pollard's work at MINSY Pollard was primarily as a welder, at least from 1966 to 1973 and again from 1980 to 1995; and from 1967 to 1970 he was "nuclear certified," which meant he could work in the nuclear areas of a ship. Though Pollard worked onboard approximately 19 different ships and submarines, he testified that some 50% of his work between 1966 and 1973 was on the construction of four new submarines—the USS Guitarro, USS Hawkbill, USS Pintado, and USS Drum.[3] Pollard left MINSY in November 1995, and worked at a steel fabrication company in Concord, from which he retired in 1997 when he injured his shoulder.

As noted, the only defendant at trial was Metalclad. Despite this, the evidence supporting the claim against it is difficult to ascertain, as it is not meaningfully before us—indeed, not even set forth in Pollard's brief. The apparent reason is that several witnesses testified via deposition, which testimony was by stipulation not reported and is not in the record, and included among these witnesses were people connected with Metalclad who would apparently provide whatever the evidence Pollard would contend supports Metalclad's involvement. What we glean, therefore, as to Pollard's claim against Metalclad is found in various arguments of Pollard's counsel and whatever admissions or concessions by Metalclad we find in the record.

Unibestos was an insulation product manufactured by Pittsburgh-Corning. One order of Unibestos was supplied to MINSY, supplied via Metalclad which was acting in the capacity of broker or "middleman." The order was in 1968, and consisted of 542 cartons of Unibestos. The order was apparently cleared for use at MINSY in March 1969, and 80% of it was in fact thereafter used at MINSY.[4]

As Metalclad concedes, there was evidence that the Unibestos supplied via Metalclad was designated to be used in the nuclear areas of the Guitarro, the Hawkbill,

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[3] Pollard acknowledged that he did not actually work aboard those four submarines all that time, as the 50% estimate included work at the welding shop, time spent in class (at least 22 weeks), six months at the Hunter's Point Naval Shipyard, and time spent at other shops.

[4] The remaining 20% was "downgraded."

the Pintado, and the Drum, the four submarines on which Pollard worked. And, as noted above, Pollard testified he worked in the nuclear areas of these four submarines between 1966 and 1973, though he could not specify if it was after March 1969, when the Unibestos supplied by Metalclad was cleared for use. [5]

**C. Pollard's Medical History, And The Claim of Asbestosis**

Beginning sometime in the 1980s, Pollard was enrolled in an asbestos monitoring program at MINSY. Following a 1993 physical in connection with that program, Pollard was informed that a B-reader[6] had "found something on [his] film" and advised him to advise his primary caregiver. Pollard did that and for reasons unexplained in the record he also contacted Brayton Purcell, the law firm that would come to represent him in the within lawsuit some 10 years later. Save for this one read in 1993, Pollard's medical history for lung-related issues was uneventful for perhaps as long as 20 years.

That is, Pollard admitted that he had annual physical examinations at Kaiser Permanente since sometime in the 1980's; he also had chest X-rays taken at Kaiser, including after the 1993 read at MINSY. Not one of those physicals, and not one of those X-rays, recorded any asbestos-related disease, and Pollard was never diagnosed with any asbestos-related disease by any doctor at Kaiser.

Notwithstanding that history, at some point Pollard again contacted Brayton Purcell, the explanation for which is likewise not in the record beyond Pollard's testimony that he asked the firm if "they would revisit [his] case because [he] was concerned about it." When this contact occurred is not clear in the record,[7] nor is exactly what happened following it, except that on March 19, 2003, Brayton Purcell filed the complaint in this lawsuit—some 10 months before Pollard was diagnosed with asbestosis.

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[5] There was apparently evidence that Pittsburgh-Corning directly supplied Unibestos insulation to MINSY for use in the nuclear areas of these submarines as well.

[6] A B-reader is a radiologist who has been trained and certified to interpret chest x-rays under a standardized system published by the International Labor Organization.

[7] Pollard first testified that this contact was in January 2000, though later examination indicates it was probably in 2003.

Brayton Purcell referred Pollard to pulmonologist Herman Bruch, M.D. for examination. The examination occurred on January 14, 2004, and on that same day Dr. Bruch diagnosed Pollard with asbestosis. Specifically, Dr. Bruch told Pollard that his lungs "were scarred," and then told him he "had asbestosis condition." Dr. Bruch advised Pollard to tell his primary care physician at Kaiser, advice Pollard did not directly follow. Rather, when Pollard ultimately received a copy of Dr. Bruch's report—received, not incidentally, from Brayton Purcell—Pollard mailed it to his primary care physician at Kaiser. Pollard testified that his had no "need" to personally inform his primary physician of Dr. Bruch's diagnosis, and made no effort to follow up with them to discuss it. And he never sought a second opinion at Kaiser to confirm Dr. Bruch's diagnosis.[8]

Dr. Bruch summarized his diagnosis in a March 3, 2004 report, whose "Summary and Conclusion" began as follows: "This patient has had extensive asbestos exposure in his long career as a welder at the Mare Island Shipyard, beginning in 1966 and ending in 1995, with a seven-year hiatus. He extensively used asbestos blankets and gloves during his work and worked in close proximity onboard ships to people who used asbestos directly to insulate. His CT scan shows mild-to-moderate interstitial fibrosis that is indicative of mild-to-moderate pulmonary asbestosis. His pulmonary diffusing capacity is moderately reduced, which is most likely a reflection of the radiologic abnormalities seen. He is not yet disabled from this condition. There is very mild pleural thickening present. While this finding is nonspecific, it probably represents early asbestos-related pleural disease."

[8] Pollard had various medical conditions that required specialized care from Kaiser over the years, including a right shoulder surgery, carpal tunnel surgery, and a hernia surgery. He also suffered from Gastroesophageal Reflux Disease, kidney stones, foot pain, and lower back pain. And for each of these medical problems, Pollard first saw his primary caregivers, who were internal medicine specialists, who then sent him to specialists such as surgeons and orthopedists for treatment.

The CT scan referred to in Dr. Bruch's report was done by Donald Breyer, M.D. F.A.C.R., a certified B-reader who had performed a CT scan on Pollard on January 14, 2004, the same day as Dr. Bruch's diagnosis. Dr. Breyer wrote a one-page report of his impression, as follows: "Impression: The parenchymal findings present are compatible with mild interstitial fibrosis. The distribution and appearance are compatible with asbestos related interstitial fibrosis. [¶] Bilateral changes of diaphragmatic pleural plaque. This finding is compatible with asbestos related pleural disease. [¶] Azygos lobe.

As discussed at length below, what Dr. Bruch's March 3, 2004 summary does not refer to is another report also done on January 14, 2004, a report by Bailey Lee, M.D., a radiologist who works at the same hospital as Dr. Bruch and to whom Dr. Bruch refers his own patients. Dr. Lee's report read Pollard's CT scan as normal.

The testimony of Drs. Bruch and Breyer was the sum total of the evidence supporting Pollard's claim of asbestosis. There was no evidence whatever from any of Pollard's treating physicians at Kaiser. And there was contrary expert evidence produced by Metalclad, some of which is discussed below in connection with the issue to which it particularly pertains.

**D. <u>The Proceedings Below</u>**

Pollard's case against Metalclad proceeded to jury trial beginning July 8, 2005. On July 28, 2005, the jury returned its special verdict, answering "yes" to questions whether Unibestos was a defective product, whether there was a failure to warn, and whether Metalclad was negligent. Following each of those determinations, the jury also found that none of them was "a cause of injury" to Pollard. On August 29, 2005, judgment on special verdict was entered. Pollard moved for new trial and for judgment notwithstanding the verdict. Both motions were denied, and Pollard filed a timely notice of appeal.

## II. DISCUSSION

### A. The Special Verdict Is Supported By Substantial Evidence

Pollard's opening brief contains three arguments, the first of which is that "[t]he evidence was sufficient to establish that Pollard's exposure to Metalclad's asbestos-containing products was a substantial factor in causing his disease." Metalclad's respondent's brief persuasively demonstrated how misplaced such an argument is here, in light of the well-settled rules of appellate review. Faced with that, Pollard's reply brief states that Metalclad's "analysis completely misses the mark. Pollard does not appeal on the ground that the evidence was insufficient to support the jury's findings . . . . Rather, Pollard contends that the judgment should be reversed because the trial court committed legal errors and abused its discretion in a manner which biased the record and prejudiced the jury's ability to evaluate the key disputed issue of causation in this case."

Whether Pollard makes a lack of substantial evidence argument or not, to put his two evidentiary contentions in context, we begin by noting that there certainly was substantial evidence to support the verdict, under the well-settled principle that all evidence must be viewed most favorably to Metalclad and in support of the judgment. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429; see *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881, and see generally 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal § 359, pp. 408-410, and § 370, pp. 420-422.) There was substantial evidence that Pollard was not exposed to the Unibestos distributed by Metalclad. And substantial evidence that Pollard did not have an asbestos-related disease.

Taking up the latter conclusion first, it is enough to note the testimony of Metalclad's expert witness, Norman Moscow, M.D., a radiologist and a certified B-reader. Dr. Moscow reviewed all the pertinent medical records, including the various B-reads of the chest X-rays taken through the MINSY asbestos mandatory program, the chest X-rays taken over the years at Kaiser, and the radiologists' reports regarding those x-rays. Dr. Moscow testified that, despite the reference to a pleural abnormality in Pollard's January 1993 chest X-ray, the later B-reads, including one in December 1993

and two in 1995, were read as normal. This, Dr. Moscow testified, is inconsistent with asbestos-related pleural or pulmonary abnormalities.

Likewise the radiology reports from Kaiser in 1999, 2000, and 2002, none of which recorded any asbestos-related abnormalities. Finally, Dr. Moscow reviewed the chest X-rays and CT scan taken on January 14, 2004, at Doctor's Medical Center, as well as the reports of Dr. Bailey Lee, who took the film, and the reports of Pollard's experts Bruch and Breyer about those films. Dr. Moscow testified that his B-read of the chest X-ray was 0/0 and, in short, showed no abnormalities. Dr. Moscow's testimony provides abundant evidence supporting the jury's verdict. So, too, the testimony from Pollard himself.

As indicated above, in 1993 Pollard learned of a reading from a chest X-ray which he was advised "found something in [his] film." This caused him to contact attorneys at Brayton Purcell, though obviously nothing came of it. Thereafter, as Pollard was forced to admit, he was never diagnosed by any of his Kaiser physicians with any asbestos-related disease. Nor did anyone in the MINSY monitoring program inform him that any post-1993 X-ray showed any abnormality. Indeed, it was not until 2004, a year after Pollard had recontacted the law firm and which had already filed the suit on his behalf, that he was diagnosed with any abnormality—and then only by the doctor to whom the law firm had referred him. And, Pollard acknowledged, up to the time of trial he did not suffer from any symptoms related to asbestosis.[9] In addition to that medical evidence, Pollard admitted that he ran several miles on the treadmill and worked out several times each week.

A primary component of Metalclad's defense was that Pollard had no injury at all, and much of Metalclad's cross-examination, and a significant part of its argument, was to the effect that Pollard's claim was essentially trumped up, supported solely by two expert

[9] Pollard did suffer from Gastroesophageal Reflux Disease, which causes fibrosis in the lungs, and which can give off a similar radiographic appearance as asbestosis.

witnesses who had significant ties to Pollard's attorneys—and, it developed, serious credibility issues. This, too, provides substantial evidence supporting the verdict.

Numerous authorities recognize the possible issues presented by the "hired gun," the expert with so-called one-sided expertise, a hazard magnified many times over when the one-sidedness is essentially for the same law firm. One such case is *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621 (*Howard*), a case well known to Brayton Purcell, Pollard's law firm, which was also counsel for the unsuccessful appellant Howard. There, in an asbestosis case like here, Division Three of this court affirmed a defense verdict despite expert evidence that Howard had asbestosis—and despite that defendant failed to present any expert testimony whatsoever. The Court of Appeal concluded that substantial evidence nevertheless supported the defense verdict, on the basis that the jury could have found the expert testimony from plaintiff's experts—as noted, testimony uncontroverted in the record—lacked credibility. Various reasons for such possible conclusion were listed, among which was that "the jury also heard evidence that Dr. Ray was retained and paid by Howard's attorneys for purposes of this litigation; she had been employed by that law firm for over 10 years in support of the firm's asbestos litigation practice; and she rarely diagnosed a patient referred to her as *not* suffering from an asbestos-related disease. Of course, the jury could properly take all this information into account in evaluating Dr. Ray's testimony." (*Id.* at p. 635, fn. 8.)

Seemingly, no lesson was learned from *Howard*, nor from the warnings in the practical treatises including, for example, that it is best to avoid retaining experts who the authors describe as "professional testifiers," as they come across as "hired guns" whose credibility may be "seriously impinged." (Flahaven, Rea, Kelly & Tenner, Cal. Practice Guide: Personal Injury (The Rutter Group 2006), 2-1035.) Here, as in *Howard*, the jury could well have concluded that the opinions of Pollard's experts were not worthy of belief.[10]

[10] Dr. Bruch reviewed only portions of Pollard's medical records and, in fact, did not know that Pollard's own doctors had never diagnosed asbestosis. Likewise

There was also evidence from which the jury could conclude that Pollard was not exposed to the Unibestos supplied by Metalclad. Such evidence includes that the Unibestos supplied by Metalclad was cleared for use in March 1969, and Pollard could not specify if he worked on the four submarines before or after that time. Moreover, between 1966 and 1973 Pollard also attended 22-24 weeks of classroom training, worked at another shipyard for six months, worked at the MINSY welding shop for six months, and worked at various other shops in the shipyard. Finally, Unibestos insulation was not the only insulation product used in the nuclear areas of vessels, and Pollard could not distinguish Unibestos insulation from other insulation. This, too, could support the verdict for Metalclad. (See *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982 ["plaintiff must first establish some threshold *exposure* to the defendant's defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his

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Dr. Breyer, who had not reviewed all of Pollard's previous X-rays and did not know that Pollard had a series of normal B-reads.

Dr. Bruch ordered a CT scan at Doctor's Medical Center, where he practices, which was read by Bailey Lee, M.D., whose findings were that the scan was "normal." Dr. Bruch did not include Dr. Lee's finding in his report to Brayton Purcell. Instead, Dr. Bruch had Dr. Breyer do another CT scan, the one referred to in his report.

Drs. Bruch and Breyer both had longstanding ties to the Brayton Purcell firm which were apparently mutually beneficial. For example, 40% of Dr. Bruch's income came from his expert consulting work for Brayton Purcell, the only law firm for which he consulted. And while only 20% of Dr. Breyer's practice involved legal consulting, Brayton Purcell was the only firm that regularly sent him films to review.

Perhaps more significantly, Dr. Bruch had been a partner with Dr. Ray, the expert in *Howard, supra,* 72 Cal.App.4th 621 at p. 626, in the East Bay Pulmonary Medical Group. And starting from the days that Dr. Ray did consulting work for Brayton Purcell, the law firm received a discounted rate of almost 50% for its clients' x-rays and CT scans. Not only was the relationship economically beneficial to the law firm, it was perhaps also beneficial professionally, as Dr. Breyer admitted that he had twice testified at deposition that he had provided blank prescriptions to Brayton Purcell to order X-rays and CT scans for its clients, continuing the practice of Dr. Ray.

injury. . . ."]; *McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1103 ["If there has been no exposure, there is no causation."].)

In light of the above factual framework, we turn to Pollard's two evidentiary contentions.

B. **The Contention Regarding Dr. Hughson Has No Merit**

Pollard's first contention regarding the evidence is that the trial court "erred in excluding Dr. Hughson's testimony—the deposition was admissible pursuant to Code of Civil Procedure section 2025.620(c)."

Dr. Hughson was William Hughson M.D., an internist, pulmonologist, and occupational medicine specialist who had been listed on the "master expert designation" filed by joint defense counsel. Shortly before trial Pollard moved in limine to exclude Dr. Hughson's testimony on the ground that he was not properly designated. The motion was denied, and Dr. Hughson was deposed on July 12, 2005, by telephone. Then, several days into the trial Pollard's counsel argued that "a third" of Dr. Hughson's testimony was cumulative to that of a Dr. Levine, and sought to exclude one or the other expert on that ground. During argument on the issue, the court inquired which witness would be testifying first, to which counsel for Metalclad replied that this was not known at the time. The court wisely noted that "we would know as the examination progresses whether or not it's cumulative, wouldn't we?" Pollard's counsel replied he "know(s) it is cumulative," and the court noted that "we'll see . . . We'll wait and see if it is cumulative . . . and we can deal with it through objections at that point."

The next reference to Dr. Hughson came the next day, after the instructions were settled and the court apparently having been advised that the case would be going to the jury the next day. The court and counsel were discussing the possibility of one more witness for Pollard and the possibility of getting Metalclad to "stipulate about" some damage numbers, at which point the record reflects the following:

"MR. NEVIN [Counsel for Pollard]: There's also then the issue of reading Dr. Hughson's transcript.

"MS. OBERG [Counsel for Metalclad]: I got the designations at 1:28 p.m. We came in here at 1:30. I haven't had a chance to look at that.

"MR. NEVIN: It's your expert.

"THE COURT: It's your designation. They weren't going to read anything except Pollard.

"MR. NEVIN: That was this morning.

"THE COURT: Yeah, before they learned that you—well, they learned yesterday when it came up that—was it yesterday or this morning?

"MS. OBERG: No, this morning.

"THE COURT: When you said you weren't calling him. It was this morning.

"MR. NEVIN: The day he was supposed to testify, they say he's not testifying.

"MR. ANDREAS [counsel for Pollard]: They whined and whined about getting these witnesses. We went and took the witnesses. Took the time to do it. Remember we went through this whole exercise before trial so they could get these witnesses, and we expected them to come and they pulled the plug here this morning.

"MS. OBERG: All I want to say was I need to look at them. Maybe we need to counter. Maybe we need to object. I don't know.

"THE COURT: Right. You just got that.

Then next reference to Dr. Hughson was the next day, after Pollard's last witness completed her testimony. After a sidebar conference apparently was held, the following ensued:

"MR. NEVIN: Just to put on the record what we were discussing at side bar. . . . [P]laintiff wanted to read certain portions of the transcript of the defense expert Dr. William Hughson into the record. It's the plaintiff's position that he was designated and offered, in fact, late once trial had started. Defense fought to get him offered into trial, fought to get his deposition taken. We took his deposition just last week. [¶] . . . It was clear from his deposition that he has extensive epidemiological knowledge of various asbestos fiber types and their relation to the disease process as well as state of the art specific to Metalclad, and it's plaintiff's position that due to the fact that Dr. Hughson

was scheduled to testify up until yesterday and yesterday morning was abruptly withdrawn by the defendants, that that entitled plaintiff to read in portions of his deposition testimony, and that the code sections applying to witness unavailability and reading of transcripts in that sense does not apply to an expert witness who has been offered, who has been deposed, who was scheduled to appear at trial, and who did not appear and was abruptly withdrawn the morning of his testimony.

"MS. OBERG: Your Honor, [Code of Civil Procedure section] 2034 permits the use of any expert by any party once that expert is deposed. It does not, however, say that the deposition can be used. The deposition still falls under the category of former testimony. Under [Code of Civil Procedure section] 2025[, subdivision] (u), that is strictly laid out. Although trial preservation depositions can be taken, that was not done in this case. It was actually a telephone deposition that occurred here.

"There hasn't been a showing of unavailability. Dr. Hughson was deposed last Wednesday the 13th. [sic] Today's the 22nd. There was ample time if plaintiffs were interested in assuring that Dr. Hughson's testimony be presented to this jury to get Dr. Hughson here under subpoena and to get a subpoena down and require him to appear in person. That would have been the way to secure that.

"Under the circumstances, since that did not happen, the requisite showing under Evidence Code [sections] 1291 and 260 for unavailability has not been demonstrated, and the deposition should not be permitted to be read. And I apologize. I'm using the old [Code of Civil Procedure] section with the change over of the law.

"THE COURT: Yeah.

"MR. NEVIN: Just briefly. It's plaintiff's position that the abrupt withdrawal of Dr. Hughson as a witness yesterday brings an element of bad faith. No time for the plaintiff to subpoena Dr. Hughson. Plaintiff was relying on the fact up until yesterday he was going to be here to testify, as was strongly asserted by the defendant throughout the trial and as they fought to get him not excluded as an expert. Submitted.

"MS. OBERG: Your Honor, there's no obligation. If we make a strategic decision that the case in point where we are in the trial the defense is ready to cease

putting on live witnesses, because we offered him previously, there's no obligation for us to do that, and it was something that occurred very late in the evening the night before. In other words, if plaintiffs knew that they liked what Dr. Hughson had to say, they wanted to make sure it was presented to the jury, the proper thing to have done at that point was to subpoena him and to make sure that he was going to be here live at trial.

"MR. NEVIN: Submitted.

"THE COURT: Okay. Well, the information about the defense not calling Dr. Hughson was provided yesterday morning, and as I understand what's happened since then is that there actually has been no effort to bring him here live to testify by subpoena. I don't think that there's any good cause to not apply the code requirements that would require that showing of unavailability that might prevent his deposition to be read from his absence, and I don't think there's been any showing of bad faith. So that's where I think we end up with that. I would not permit the deposition to be read to the jury in lieu of live testimony from Dr. Hughson.

"MR. NEVIN: On another note, your Honor . . . .

We begin by noting, as Pollard implicitly admits, that nowhere in the course of any argument involving Dr. Hughson did Pollard's counsel refer to "Code of Civil Procedure section 2025.620(c)," the basis of his argument here. In light of this, the contention can easily be disposed of by application of the principle that a theory not raised in the trial court cannot be raised for the first time on appeal. (See generally Eisenberg, Horvitz & Wiener, Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2006) § 8:229.) Particularly apt in this regard is the recent observation by the Supreme Court, made in the converse situation of an objection to evidence at trial different from that asserted on appeal: "A century ago, long before the Evidence Code existed, we explained the need for a specific objection. 'To require this is simply a matter of fairness and justice, in order that cases may be tried on their merits. Had attention been called directly in the court below to the particular objection which it is now claimed the general objection of appellant presented, that court would have had a concrete legal proposition to pass on . . . . Trial judges are not supposed to have the

numerous, varied, and complex rules governing the admissibility of evidence so completely in mind and of such ready application that under an omnivagant objection to a question they can apply with legal accuracy some particular principle of law which the objection does not specifically present.' " (*People v. Partida* (2005) 37 Cal.4th 428, 434.) The reason for the rule, the court confirmed, is that a "party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct." (*Id.* at p. 435.) In any event, this contention has no merit, for several reasons.

The first is that what Metalclad did—deciding not to call Dr. Hughson—was apparently a tactical decision it had the right to make. A leading treatise observes as follows: "**8:1687.5** Right to withdraw designated expert: Sometimes, a designated expert reverses his or her opinion (or starts "waffling") before deposition or trial. The party designating the expert has the right to withdraw him or her simply by "amending" its [Code of Civil Procecure, section] 2034.260(b)-(c) list. *No prior notice or leave of court* is required. (*County of Los Angeles v. Sup. Ct. (Hernandez)* (1990) 222 Cal.App.3d 647, 656.)" (Weil & Brown, Cal. Practice Guide: Civ. Procedure Before Trial (The Rutter Group 2006) § 8:1687.5; accord, Wegner, Fairbank, Epstein & Chernow, Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2005) § 11:20.5.)

*Hernandez*, the case cited in the treatises, dealt with the withdrawal of an expert witness before he was deposed, and the Court of Appeal held as follows: "We reject plaintiff's assertion that, under *Williamson* [*v. Superior Court* (1978) 21 Cal.3d 829], the County must be barred from withdrawing Dr. Verity because it is doing so only to suppress evidence. The facts in the instant case differ dramatically from *Williamson*. Here, we have one party's attorneys consulting with an expert to "investigate not only the favorable but the unfavorable aspects" of the case. ([Code Civ. Proc.,] § 2018.) No parties with adverse interests entered into an agreement supported by valid consideration to suppress evidence. (Compare *Williamson*, *supra*, 21 Cal.3d at p. 836.*)* We do have one party who, for tactical reasons and in its *own* interest, has chosen not to call one of its witnesses. Under these circumstances, there simply is no requirement that a party call a particular witness. Given these facts, we conclude, therefore, the County could withdraw

its previously designated witness before his deposition." (*Hernandez, supra,* 222 Cal.App.3d 647 at p. 656.)

While, as noted, *Hernandez* dealt with the withdrawal of an expert before he was deposed, we can discern no reason why the rule would be different after the deposition, especially as the Code of Civil Procedure provides for the use of a deposition in certain circumstances.

That section is Code of Civil Procedure section 2025.620, cited in Pollard's brief, which provides in pertinent part as follows: "At the trial in the action, any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition . . . so far as admissible under the rules of evidence applied as though the deponent were then present and testifying as a witness, in accordance with the following provisions: [¶] . . . [¶] (c) Any party may use for any purpose the deposition of any person . . . if the court finds any of the following: [¶] (1) The deponent resides more than 150 miles from the place of the trial . . . . [¶] (2) The deponent, without the procurement or wrongdoing of the proponent of the deposition for the purpose of preventing testimony in open court, is . . . [¶] . . .[¶] (D) Absent from the trial or other hearing and the court is unable to compel the deponent's attendance by its process. [¶] (E) Absent from the trial or other hearing and the proponent of the deposition has exercised reasonable diligence but has been unable to procure the deponent's attendance by the court's process. [¶] (3) Exceptional circumstances exist that make it desirable to allow the use of any deposition in the interests of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court."

Based on the italicization in his brief, Pollard apparently contends that subsections (c)(1) and (c)(3) of section 2025.620 apply. As to the former, Pollard asserts that the trial court was "aware that Dr. Hughson reside[s] in San Diego—well over the 150 mile limit." However, no such showing was made to the trial court. And as to subsection (c)(3) of 2025.620, the exceptional circumstances provision, we see no showing of such circumstances here. Indeed, to the extent that Pollard viewed Dr. Hughson's testimony as being crucial, or critical, or even helpful to his case, he could

well have done something to assure its being introduced—especially in light of the representation in the deposition *that Pollard's counsel had deposed Dr. Hughson 40 times before*!

Moreover, one reads the record in vain to ascertain precisely which portion(s) of Dr. Hughson's deposition testimony Pollard intended to read. He made no such showing to the trial court, without which another settled principle of appellate review comes into play: failure to make an adequate offer of proof at the trial court level precludes consideration on appeal of an alleged erroneous exclusion of evidence. (See Evid. Code, § 354; *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 344; see generally Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, §§ 401-402, pp. 490-492.)

While never asserting that he made a true offer of proof to the trial court, Pollard does assert that the "record reflects that Metalclad's *counsel* received a copy of the designated excerpts Pollard wished to read." (Italics added.) Maybe so, but this is not the same as apprising the *court* of the requested evidence which, of course, is the reason for the offer of proof. In sum, the trial court's refusal to allow the reading of Dr. Hughson's deposition was not error. And it was certainly not an abuse of discretion. (*People v. Cox* (2003) 30 Cal.4th 916, 955; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

In contrast to what occurred in the trial court, Pollard here at least attempts to describe the claimed thrust of the evidence, his opening brief asserting as follows: "Pollard, who had not yet rested, asked to read excerpts of Hughson's deposition testimony, which makes the critical admissions that Unibestos was one of the very few products that the Navy used that contained amosite asbestos; that amosite fibers are more hazardous and more carcinogenic than chrysoltile; that amosite poses a *hundred times higher risk* of developing mesothelioma and a *ten-fold higher risk* of lung cancer to individuals who have asbestosis; and that amosite also poses a ten-fold higher risk of getting asbestosis.[fn]" The referenced footnote states that the "key testimony is on deposition pages 41-54. (AA 218-222.)"

We have read that "key evidence" and conclude that even if Pollard were correct and Dr. Hughson's evidence should have been read, refusal to allow its reading could not be reversible error, for at least two reasons.

First, much of what Pollard refers to in his brief was already before the court, via two expert witnesses called by Pollard who testified about amosite asbestos. One was Charles Ay, a former insulator and now consultant, who testified that Unibestos was unique in containing amosite and that the other types of asbestos insulation, muds, cements, cloth, insulated wiring, gaskets and packing materials commonly used on ships contained the chrysotile form of asbestos.

The other, and even more significant, witness, was industrial hygienist Kenneth Cohen. As Pollard's brief describes it, Cohen "testified that Unibestos was composed primarily of amosite asbestos; that Unibestos will release respirable asbestos fibers whenever it is cut or manipulated; and that exposure to Unibestos poses a substantial risk of asbestos-related disease. RT 620-621, 630-633. He stated that none of the other asbestos-containing products on the Navy ships likely contained amosite, RT 709-711, and that: '[¶] I would conclude that asbestos would be released more likely than not from any Unibestos materials used aboard [the vessels Pollard worked on], and some portion of that released asbestos would remain in the air aboard those vessels absent evidence of a scrupulous abatement procedure and would be available to Mr. Pollard to breathe during any time he entered into those spaces, regardless of what the work activity would have been . . . .' RT 640:18-27. [¶] Cohen reported that 'Unibestos thermal insulation would release more fibers per cc with the same procedures performed on other thermal insulation materials of different composition,' (RT 644) and that the risk to a worker would be 'far greater'. RT 645." Dr. Hughson's testimony would indeed have been cumulative, as Pollard's counsel urged in the second motion at trial, but cumulative of evidence other than that argued by counsel.

The second, and even more fundamental, reason that the unread testimony of Dr. Hughson could not have prejudiced Pollard is because it could not have affected the jury's verdict. As noted, we have read the "key testimony," including what Dr. Hughson

said about the greater risk presented by amosite. The questions and answers were as follows:

MR. NEVIN: "Q: So in your view, am I to believe that fibers such as amosite are the most hazardous, is that correct?

"A. Amosites are more hazardous than Chrysotile.

"Q. Are amosites more carcinogenic, in your view?

"A. Yes.

"Q. So in your opinion, a person occupationally exposed to prospective amosite fibers would be at a much greater risk of contracting *mesothelioma* than the exposure to Chrysotile?

"A. Yes.

"Q. And that hypothetical future risk of *mesothelioma* the risk would exclusively be from what kind of exposure?

"MS. BLAIR: Objection, unintelligible.

"THE WITNESS: I think Chrysolite exposure can cause mesothelioma, but it does so rarely and it takes massive amounts to do so.

"MR. NEVIN: There's paper on that subject. Do you agree with the estimate of fiber potency that Mardsen and Darden say in their paper?

"THE WITNESS: Yes.

"MR. NEVIN: Q. So in your view in this case, the plaintiff, Mr. Pollard, his exposure to Chrysolite asbestos in certain kinds of insulation, gaskets, packing, muds, and welding blankets would be trivial to his amosites insulation exposure?

"MS. BLAIR: Vague and ambiguous. Calls for speculation. Lacks foundation.

"THE WITNESS: Well, put it this way: Let's for the sake of the hypothetical, say that there are equal amounts of Chrysolite to amosite, then the risk attributable to the amosite would be about 100 times greater than the risk attributable to Chrysolite that would be at risk for mesothelioma.

"For that and for lung cancer, the risk would be ten times greater to amosite than for Chrysolite, but, of course, in my view, which is a view shared by many, you need asbestosis before you have an increased risk of lung cancer.

"MR. NEVIN: Q. So 1 to 100 ratio for mesothelioma, and 1 to 10 ratio for lung cancer, is that right?

A. *If you have asbestosis."* (Italics added.)

Pollard's case was that he had asbestosis, not mesothelioma. Dr. Hughson's testimony dealt with risks of mesothelioma and increased risks of cancer "if you have asbestosis." The jury decided the issue adversely to Pollard. Dr. Hughson's testimony would not have changed that verdict. Any error is necessarily harmless. (See *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800-802; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, the primary case relied on by Pollard here, is not to the contrary. There, in a medical malpractice case, plaintiff sought to read the deposition testimony of the defendant doctors' standard of care expert in plaintiff's own case-in-chief. The defense objected on the ground that the medical expert was their witness, but assured plaintiff and the court that the witness would be called in the defense case-in-chief. When the defense thereafter withdrew the witness, plaintiff again sought to read the witness's deposition testimony, the defense objected, and the trial court agreed that the deposition testimony was insufficient to qualify the witness as an expert on the standard of care. (*Id.* at pp. 217-218.)

Reversing a jury verdict for defendant, Division Five of this court held as follows: "Early in the trial when appellant had sufficient time to secure Schifrin as a witness, respondents objected to appellant reading his deposition testimony on the ground that Schifrin was their witness and that they would call him during their case—they specifically represented to the court and to appellant that they would do so. Then, when the trial was nearly over, respondents advised appellant and the court that they were not calling Schifrin and, for the first time, objected to his testimony on technical grounds that they had to know were without support. Regardless of respondents' motives or reasons,

the impact on appellant was the same: he was lulled into a false sense of security and deprived of the opportunity to present relevant and important evidence in support of his case. [¶] We conclude that but for the court's erroneous exclusion of Schifrin's testimony, it is reasonably probable a result more favorable to appellant would have been reached in his case against Neff. Schifrin's opinion on abnormal labor went to a major issue in the case." (*Alef v. Alta Bates Hospital*, *supra*, 5 Cal.App.4th at p. 219.)

Here, by contrast, Pollard could hardly be said to be lulled into any false sense of security. After all, Pollard twice attempted to *preclude* Dr. Hughson's testimony, so it could hardly be deemed "important evidence." Furthermore, Pollard's counsel had apparently deposed Dr. Hughson some 40 times, so if the testimony was so important, Pollard could have done the necessary to ensure its presentation, including citing the applicable code section, making the necessary offer of proof, and whatever else was procedurally required. Finally, as noted, the testimony would not have made a difference.

For each, and all, of the above reasons, we conclude that Pollard's contention regarding Dr. Hughson has no merit. Likewise the contention regarding Dr. Lee.

C. **The Contention Regarding Dr. Lee Has No Merit**

Pollard's other contention asserts that the trial court abused its discretion "when it permitted Metalclad's counsel to question Dr. Moscow about, use a blowup of, and argue about Dr. Lee's hearsay medical opinions." We are not persuaded.

The circumstances giving rise to the issue regarding Dr. Lee arose during the cross-examination of Dr. Bruch, Pollard's expert pulmonologist. During that examination, Metalclad's counsel learned, apparently for the first time,[11] that Dr. Bruch's file contained a report prepared by Dr. Lee of a January 14, 2004 CT scan done at Doctor's Medical Center, where Dr. Bruch practiced. It happened as follows:

Metalclad's counsel obtained from Dr. Bruch acknowledgment that his practice was to have radiologists at Doctor's Medical Center "regularly interpret" CT scans and

[11] Dr. Bruch had apparently not been deposed.

X-rays; this led to further testimony that Dr. Bruch had in fact referred Pollard for such a scan and X-ray, on January 14, 2004. Asked if that led to a report, Dr. Bruch said it "probably did, yes." Dr. Bruch then located such report in his file and provided it to Metalclad's counsel. Metalclad's counsel asked that the report be copied and marked for identification, as Exhibit J, and without more attempted to move exhibit J into evidence. This generated a hearsay objection and, without waiting for a ruling on the objection, Metalclad's counsel then obtained from Dr. Bruch admissions that the report was "Pollard's CT scan report" and that he, Dr. Bruch had read the report before "coming here today." Metalclad's counsel again attempted to move the report into evidence; again Pollard's counsel objected. After a sidebar discussion the court ruled that the report is "not admissible over objection at this time . . . ."

There followed three pages of questioning by Metalclad's counsel about the report, including the leading question that the report manifests "the technique you told us all is the 'gold standard' for determining whether a patient has asbestos-related pleural disease or the scarring known as asbestosis, is that correct." There was no objection, and Dr. Bruch answered, "That's correct." Following that answer, the record reflects the following:

"MR. NEVIN: Objection.

"MR. BERFIELD: Q. And this is the technique that was demonstrated on the CT scan, Image 13 and 19, on Plaintiff's Exhibit 10 that you had on the screen. Do you remember that, Doctor?

"MR. NEVIN: Objection. Vague, unintelligible. I don't know what "technique" means.

"THE COURT: The pictures 13 and 19 that were shown to the jury, and that report refers to at least those two images.

"MR. NEVIN: Thank you.

"MR. BERFIELD: Thank you, your Honor. Q. Is that correct, Doctor?

"A. Yes."

Following more questions about Dr. Lee and his report, none of which was objected to, Metalclad's counsel began another question about the report, to be interrupted, as follows:

"MR. BERFIELD: Q. It says, "Following initial AP—"

"MR. NEVIN: Objection. Hearsay.

"THE COURT: Well, why don't we do this. It's not in evidence, but—

"MR. BERFIELD: I'll rephrase the question. I'll withdraw it.

"THE COURT: Okay."

There ensued many more questions about Dr. Lee and his report, all answered essentially without any objection except one "assumes facts" and one "argumentative."

Dr. Lee's name came up again, in the direct examination of Dr. Moscow, Metalclad's expert radiologist. Metalclad's counsel asked Dr. Moscow various questions about Dr. Lee, including about his competence. No objection was made by Pollard's counsel. Indeed, the only two objections even mentioned by Pollard in his brief are set forth in footnote 17, which states that "Pollard objected to some of those questions. RT 732, 734." These "objections" are hardly availing.

At reporter's transcript, p. 732, the first cited page, Metalclad's counsel asked Dr. Moscow whether he received Dr. Lee's report. The actual record reads as follows:

MR. BERFIELD: "Q. Okay. And in addition to the records that were sent to you by Berry & Berry, did you also receive a CT scan report of January 14, 2004, by a Dr. Bailey Lee?

"A. Yes. I have seen that report.

"MR. NEVIN: Objection, 2034.

"THE COURT: The objection is overruled."

Whatever "2034" means, it could not preserve any claim of error, not in light of the rule that any objection must state the specific ground on which it is based. (Evid. Code, § 353, subdivision (a); *People v. Boyette* (2002) 29 Cal.4th 381, 424.)

The second referenced "objection" is difficult to find, as what occurred was Metalclad's counsel referred to Dr. Lee's report, at which Pollard's counsel said "may we

approach?" There followed, according to the record, an "off-record discussion in back hallway." But no ruling on the objection—indeed, as best we can tell, no objection. Pollard's counsel himself went on to cross-examine Dr. Moscow about Dr. Lee, which led to further questioning on redirect about Dr. Lee's training, and the final confirmation that it was Dr. Bruch, Pollard's expert, who referred Pollard to Dr. Lee. Again, no objections were made by Pollard.

Dr. Lee was also mentioned in closing argument, with the first mention *by Pollard's counsel*, who attempted to discredit Dr. Lee and his report. Then, during his argument, counsel for Metalclad referred to Dr. Lee's report, which he described as "marked as Defense Exhibit J." Hearing this, Pollard's counsel "renew[ed] objection, hearsay and 352," to which the court replied, "[T]his was never admitted into evidence, but it was in the file of Dr. Bruch who did examine that and considered it in making his own opinion. Also Dr. Moscow, I think . . . during his testimony referred to that. So it's not offered for the truth, but offered on a piece of information upon which the medical doctors, the experts here relied on in formulating their opinions." With that, counsel for Metalclad embarked on his argument about the significance of Dr. Lee's report, which was uninterrupted by any objection or request for admonition, save one objection that the argument "assumes fact not in evidence." The final reference to Dr. Lee was in the closing argument of Pollard's counsel.

As noted above, Pollard contends that the trial court abused its discretion when it permitted Metalclad's counsel "to question Dr. Moscow about, use a blow-up of, and argue about" Dr. Lee's hearsay medical opinions. Such argument heading specifically does not mention the cross-examination of Dr. Bruch, and it would appear that Pollard concedes that it was proper. On the other hand, both Pollard's opening brief (e.g. AOB 35-36) and his reply (RB 6-8) refer to the cross-examination of Dr. Bruch, and it may be that Pollard asserts that this cross-examination, too, was error. Whatever the contention, because Dr. Lee's report first surfaced in the cross-examination of Dr. Bruch, we begin with a discussion of the law of such cross-examination.

It is "well established" that wide latitude is allowed in cross-examining an expert witness. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 796 (*Grimshaw*).) As *Grimshaw* went on to hold, " ' "Once an expert offers his opinion . . . he exposes himself to the kind of inquiry which ordinarily would have no place in the cross-examination of a factual witness. The expert . . . may be 'subjected to the most rigid cross-examination' concerning his qualifications, and his opinion and its sources." ' " (*Grimshaw, supra,* 119 Cal.App.3d at p. 796, fn. 7.) The Supreme Court has made a similar observation, that a "broader range of evidence" may be used on cross-examination to test and diminish the weight to be given the expert opinion than is admissible on direct examination to fortify the opinion. (*People v. Coleman* (1985) 38 Cal.3d 69, 91-93.)

Evidence Code section 721, subdivision (b)(1) provides that an expert may be examined about anything he or she "referred to, considered, or relied upon." And *People v. Kozel* (1982) 133 Cal.App.3d 507, 535, held that anything considered by an expert can be the subject of cross-examination. Here, as quoted above, Dr. Bruch expressly acknowledged that he read Dr. Lee's report before "coming here today." The Evidence Code and *Kozel* are on point.

Given that the cross-examination of Dr. Bruch was proper, it cannot be gainsaid that what resulted from that cross-examination would be proper subject matter for the remainder of the case, including examination of subsequent witnesses and, of course, closing argument. But even if it were not, Pollard has failed to present the issue for review as he failed to properly object below.

" '[A]s a general rule, "the failure to object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal.' [Citations.] . . . This rule applies equally to any claim on appeal that the evidence was erroneously admitted, other than the stated ground for the objection at trial. When an objection is made to the proposed evidence, the specific ground of the objection must be stated. The appellate court's review of the trial court's admission of evidence is then limited to the stated ground for the objection. (Evid. Code, § 353.)' " (*People v. Kennedy* (2005) 36 Cal.4th

595, 612; see also *People v. Boyette, supra,* 29 Cal.4th at p. 424 [“ ‘Specificity is required both to enable the court to make an informed ruling on the motion or objection and to enable the party proffering the evidence to cure the defect in the evidence.’ ”].)

*Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851 is dispositive. *Mosesian* was an action for crop loss against a pesticide manufacturer, in which the jury returned a defense verdict. The trial court granted a new trial on the ground that defendants had elicited on direct examination of their own expert the substance of other, unavailable experts. The Court of Appeal reversed, holding that the new trial was improper as plaintiff’s counsel had failed to timely object to the admission of the hearsay opinions or move to strike the expert’s opinion, thus waiving any error. “Failure to make a timely objection or motion to strike inadmissible evidence constitutes a waiver of the right to later complain of its erroneous admission into evidence. [Citation.] Parties also waive the right to later contest the admissibility of evidence where counsel fails to state the specific, correct ground or grounds supporting the objection. [Citation.] Where there is no motion to strike an expert’s answers to questions, a reviewing court cannot reach the claim of error. [Citation.] (*Id.* at p. 865.)

Recognizing the failure to object at all necessary times, Pollard contents himself with the following observation in a footnote: “Pollard objected to some of those questions. RT 732, 734. His decision not to object every time does not affect his right to appeal. *See Love v. Wolf* (1964) 226 Cal.App.2d 378, 392 and cases cited therein; *People v. Carillo* (2004) 119 Cal.App.4th 94, 101.” Such reliance is doubly misplaced: the objections were not availing, as discussed above, and the cited cases are manifestly distinguishable.

*Love v. Wolf, supra,* 226 Cal.App.2d 378, involved 60 instances of misconduct, misconduct the Court of Appeal described as “intentional, blatant and from opening statement, throughout the trial, to closing argument.” (*Id.* at pp. 385, 393.) The setting here is a far cry. *Carillo, supra,* 119 Cal.App.4th 94, involved a prosecutor who embarked on a line of questioning on an improper subject, to which defense counsel made eight objections, some of which were overruled, “embolden[ing]” the prosecution.

Then, when defense counsel sought to counter that evidence the court "ordered him to drop the subject." This, the Court of Appeal noted, may well have led counsel to be "hesitant to broach the issue at times. He may well have concluded it was too dangerous to risk provoking the trial judge's wrath in front of the jury, or he may have figured further objections would only serve to highlight the issue. [Citation.]" (*Carillo, supra,* 119 Cal.App.4th at p. 101.) This is not the situation here.

Turning lastly to Pollard's claim that references to Dr. Lee in the closing argument of Metalclad's counsel was error, we conclude it was not, in light of the discussion above. The cross-examination of Dr. Bruch was proper, as was the direct examination of Dr. Moscow which, as noted, involved almost no objection from Pollard. In light of what was in the record, it was certainly fair game for Metalclad's counsel to argue it. (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1683 ["counsel was entitled to comment on the evidence in argument"]; see generally *Cassim v. Allstate Ins. Co., supra,* 33 Cal.4th at p. 795 [wide latitude to discuss merits of case].) Finally on this point, we cannot help but observe that the first mention of Dr. Lee in closing argument was by Pollard's counsel. And, to the extent Pollard asserts that it was not proper to allow reference to an exhibit not in evidence, the trial court immediately instructed the jury that the report was not in evidence, and that the report was for the limited purpose of considering Dr. Bruch's opinions.

Finally, we note that even if the argument by Metalclad's counsel was improper—which it was not—Pollard's claim here must fail in light of the rule that any claim of misconduct at trial cannot be asserted unless Pollard made a timely and proper objection at trial and a request that the jury be admonished. (*Weeks v. Baker & McKenzie* (1988) 63 Cal.App.4th 1128, 1163; *Miller v. Elite Ins. Co.* (1980) 100 Cal.App.3d 739, 761.)

## IV. DISPOSITION

The judgment in favor of Metalclad is affirmed.

_____
Richman, J.

We concur:

_____
Kline, P.J.

_____
Haerle, J.